(29,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 298

THE FERRIS COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1923

[fol. 1] IN THE

UNITED STATES COURT OF CLAIMS

Number 34556

THE FERRIES COMPANY, a Corporation, Claimant,

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed April 13th, 1920

To the honorable judges of the United States Court of Claims:

Your petitioner, The Ferries Company, a corporation, respectfully shows as follows:

1. That your petitioner is a corporation, duly organized and existing under the laws of the State of Virginia, with its principal office in the City of Portsmouth, Virginia, and that the officers and directors of your petitioner are all citizens of the United States.

2. That your petitioner, its officers and directors, have at all times borne true allegiance to the government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said government.

3. That your petitioner is the assignee and owner of the rights and property of R. E. Jordan, acquired under and by virtue of a certain lease bearing date the 31st day of March, 1909, between the City of Portsmouth and the County of Norfolk, hereinafter called the "ferry lessors," and R. E. Jordan, hereinafter called the "ferry lessee," a copy of which lease, marked "Exhibit A" is appended to and prayed to be read as a part of this petition, and which lease provides in part as follows:

[fol. 2] "Fourth. That all property turned over to the lessee, except the land, that is to say: all the buildings, boats and their appurtenances, and all movable property attached to and used in connection with said Ferries, shall be accepted and taken by the lessee upon the inventory and valuation thereof made by the board selected to make the inventory and valuation between the present outgoing lessees and the City and County, under the present existing lease; and at the termination of the said lease, all property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding lessee, should there be one, be inventoried and valued by a board of five disinterested persons, one of whom shall be chosen by the Board of Supervisors of the County, one by the Council of the City, one by the lessee, and one by the succeeding lessee, should there be a succeeding lessee; should there be no succeeding lessee then two shall be chosen by the lessee, and the four so chosen shall select the

fifth, such inventory and valuation to be returned in quadruple, should there be a succeeding lessee; one copy to the Board of Supervisors of the County, one to the Council of the City, one to the lessee, and one to the succeeding lessee; and if such valuation shall be less than the valuation of the property turned over to him, the lessee shall pay to the City and County the amount of such deficiency; but if the valuation of the property turned over to him at the termination of his lease, shall be in excess of the valuation of the property turned over, to him by them, at the commencement of his lease, then the said County and City shall pay to him the excess of such valuation, [fol. 3] but the lessee shall turn over, at the expiration of said lease, good and sufficient boats to run the schedule as required by the lease and as hereinabove stated."

4. That by virtue of a certain contract bearing date the 8th day of October, 1918, between the United States of America, acting by the Bureau of Industrial Housing and Transportation, of the Department of Labor, The Ferries Company, the City of Portsmouth and the County of Norfolk, Virginia, a copy of which contract, marked Exhibit "B" is appended to this bill and prayed to be read as a part hereof, it was agreed in part between the parties thereto as follows:

"First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk and now held by The Ferries Company, dated March 31, 1909, shall terminate as of the time that the Bureau shall take over the operation of the said ferries, in the same manner and to the same effect as if such time had been originally fixed in said lease as the time for the termination thereof;

Second. That the appraisal of the ferries' properties, so provided for in said lease, shall take place as of the time that the ferries shall be taken over by The Bureau instead of at the regular termination of the said lease, as therein provided and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by The Bureau, as aforesaid.

Third. That should any money be due The Ferries Company by the City of Portsmouth and the County of Norfolk, as a result of the said appraisal mentioned above, then such amount shall be paid to The Ferries Company by The Bureau and charged by it to the City [fol. 4] of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and if any moneys shall be due the City of Portsmouth and the County of Norfolk by the Ferries Company as a result of said appraisal, then The Ferries Company shall pay such amount to The Bureau instead of paying same to the City of Portsmouth and the County of Norfolk, and The Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them, of even date herewith."

5. That pursuant to the terms of said contract the property therein described and hereinafter enumerated, was turned over and delivered by The Ferries Company to the Bureau of Industrial Housing and Transportation of the Department of Labor of the United States of America at 12 o'clock midnight on the 31st day of October, 1918, whereupon the provisions of said lease and of said contract as to the appraisal of said property so turned over became operative.

6. That the Board provided for under the terms of said lease to inventory and value said property was constituted as follows:

Charles F. Harper, selected by the City of Portsmouth;
J. Wiley Halstead, selected by the County of Norfolk;
W. W. Colonna and J. M. Emery, selected by your complainant, and
Cornelius Thomas, selected by the four members of said Board first mentioned,

and that said Board, meeting on December 2nd, 1918, proceeded to hear evidence with respect to the inventory and value of said property and that as a result thereof two reports have been filed with the Board of Supervisors of Norfolk County, Virginia, the City of Portsmouth and your complainant, one of which reports, hereinafter called [fol. 5] the "majority report," is marked "Exhibit C," to which is appended as part thereof a transcript of the evidence upon which said report is based, and the other of which reports is marked "Exhibit D," and both of which reports, with said transcript of evidence, are appended to and prayed to be read as a part of this petition.

7. That the inventory of said property as set forth in said majority report is, to the best of the knowledge and belief of your complainant, accurate, but that the following items are the only items which are valued in accordance with the requirements of said lease:

The steam vessel "Winthrop," value	$8,500.00
Paving (Norfolk), value	3,271.40
Paving (Berkley) Pearl St., value	110.50
Supplies described in said majority report as "Miscellaneous as per list enumerated below," value	21,806.75
Total value	$33,688.65

The remaining items contained in said majority report were therein valued by Charles F. Harper, J. Wiley Halstead and Cornelius Thomas, the remaining members of said Board having declined to join in said valuation as will appear from said mapority report, upon a "normal or pre-war" value of said property and not in accordance with the value thereof as of October 31st, 1918, as required by the terms of said lease and said contract and as said value was established by the witness presented both by your petitioner and the City of Portsmouth and the County of Norfolk; all of which will appear from the Exhibits filed herewith, and the following tabulations of value compiled from said Exhibits:

[fol. 6]

Vessels	Majority report	Ferris Co., present value	Portsmouth City		Norfolk County	
			Present value	Pre-war value	Present value	Pre-war value
The Steam Vessel "Norfolk County"	$24,000.00	$60,000.00	$50,000.00	$20,000.00	$50,000.00	$20,000.00
The Steam Vessel "Twin City"	11,200.00	25,000.00	28,000.00	11,200.00	28,000.00	11,200.00
The Steam Vessel "City of Portsmouth"	19,600.00	40,000.00	49,000.00	19,600.00	49,000.00	19,600.00
The Launches "Bessie" and "Margarette"	500.00	790.00	740.44	427.25	740.44	500.00
Totals	$55,300.00	$125,790.00	$127,740.44	$51,227.25	$127,740.00	$51,300.00

[fol. 7] From the above totals it will appear that the value as of October 31, 1918, of the vessels above enumerated, as fixed by the testimony introduced by the City of Portsmouth and the County of Norfolk, is the total sum of $127,740.44, whereas the total amount fixed by said majority report to be paid your petitioner for said vessels is the total sum of $55,300.00, the sum of $72,444.44 or 57 per cent. less than the value of said vessels as of said date.

It will further appear from the above that the value of said vessels as fixed by said majority report, to-wit, $55,-300.00, is substantially identical with the "pre-war" or "normal" value fixed by said witnesses introduced by the City of Portsmouth and the County of Norfolk, namely $51,227.25, which is less than one-half of the value fixed by said witnesses for the said property as of October 31st, 1918, the date fixed by said lease and said contract for the valuation of said property.

[fol. 8]

Terminals, Portsmouth	Majority report	Ferris Co., present value	Portsmouth City		Norfolk County	
			Present value	Pre-war value	Present value	Pre-war value
Main Building, Machine Shop, Storeroom, Carpenter Shop, Stable, and other buildings	$15,201.51	$33,686.00	$29,553.00	$14,776.51	$29,553.00	$14,776.51
Docks, Bulkheads, piles, foundations, frames, all the appurtenances and equipment	13,747.43*	23,191.00	24,019.74*	12,009.89*	23,208.75	9,283.80
Bridges and pontoons	*	10,609.21	*	*	.....	2,500.00
Paving	1,349.17	1,362.00	2,110.03	1,336.35	2,110.03	1,336.35
Totals	$30,298.11	$78,848.21	$55,682.77	$28,122.66	$54,871.78	$27,896.66

[fol. 9] From the above totals it will appear that the value as of October 31st, 1918, of the Terminals at Portsmouth, above enumerated, as fixed by the testimony introduced by the City of Portsmouth and the County of Norfolk, is at least the total sum of $54,871.78, whereas the total amount fixed by said majority report to be paid your petitioner for said Terminals at Portsmouth, is the total sum of $30,298.11, the sum of $24,573.67 or 45 per cent. less than the value of said Terminals at Portsmouth as of said date.

It will further appear from the above that the value of said Terminals at Portsmouth as fixed by said majority report, to-wit, $30,298.11, is substantially identical with the "pre-war" or "normal" value fixed by said witness introduced by the City of Portsmouth and the County of Norfolk, namely, an average value of $28,009.61, which is approximately one-half of the value fixed by said witness for the said property as of October 31st, 1918, the date fixed by said lease and said contract for valuation of said property.

[fol. 10]

Terminals, Norfolk	Majority report	Ferris Co., present value	Portsmouth City		Norfolk County	
			Present value	Pre-war value	Present value	Pre-war value
Buildings and wings of same..	$7,097.37	$18,431.00	$14,197.74	$7,097.37	$14,194.74	$7,097.37
Docks, bulkheads, piles, foundations, frames, all the appurtenances and equipment	17,608.70*	17,155.00	25,582.00*	12,791.40	6,708.44	2,882.19
Bridges and pontoons	*	46,434.76	*	*	14,118.00	6,441.25
Totals	$24,706.07	$82,020.76	$39,776.74	$19,888.77	$35,021.08	$16,420.74

[fol. 11] From the above totals it will appear that the average of the value as of October 31st, 1918, of the Norfolk Terminals above enumerated, as fixed by the testimony introduced by the City of Portsmouth and the County of Norfolk, is the total sum of $37,398.96, whereas the total amount fixed by said majority report to be paid by your petitioner for said Norfolk terminals is the total sum of $24,706.07, which is the sum of $12,692.89 (or 33 per cent.) less than the value of said Norfolk terminals as of said date.

It will further appear from the above that the value of said Norfolk terminals as fixed by said majority report, to-wit, $24,706.97, is substantially identical with the average "pre-war" or "normal" value fixed by said witnesses introduced by the City of Portsmouth and the County of Norfolk, namely $18,154.78, which is less than one-half of the value fixed by said witness for the said property as of October 31st, 1918, the date fixed by said lease and said contract for valuation of said property; the difference being solely due to the difference in view between the several witnesses introduced and the majority appraisers, concerning the values of the steel float forming a part of said terminals.

[fol. 12]

Terminals, Berkley-Pearl St.	Majority report	Ferris Co., present value	Portsmouth City		Norfolk County	
			Present value	Pre-war value	Present value	Pre-war value
Pearl St. Bldgs.	$792.98	$2,150.00	$1,585.95	$792.98	$1,585.96	$792.98
Docks, piles, foundations, frames, equipment, and appurtenances	8,019.89*	15,525.00	13,157.50*	6,576.78	14,776.59	5,680.64
Bridges and pontoons	*	5,635.69	*	*	3,125.00	1,250.00
Totals	$8,812.87	$23,310.69	$14,743.46	$7,369.76	$19,487.55	$7,723.62

[fol. 13] From the above totals it will appear that the value as of October 31, 1918, of the Pearl Street-Berkley Terminals above enumerated, as fixed by the testimony introduced by the City of Portsmouth and the County of Norfolk, is the average total sum of $17,115.50, whereas the total amount fixed by said majority report to be paid your petitioner for said Pearl Street-Berkley Terminals is the total sum of $8,812.87, which is the sum of $8,302.63 (approximately 50 per cent) less than the value of said Pearl Street-Berkley Terminals as of said date.

It will further appear from the above that the value of said Pearl Street-Berkley Terminals as fixed by said majority report, to-wit, $8,812.87, is substantially identical with the average "pre-war" or "normal" value fixed by said witnesses introduced by the City of Portsmouth and the County of Norfolk, namely $7,546.64, which is approximately one-half of the value fixed by said witnesses for the said property as of October 31st, 1918, the date fixed by said lease and said contract for the valuation of said property.

[fol. 14]

Terminals, Berkley-Chestnut Street	Majority report	Ferris Co., present value	Portsmouth City		Norfolk County	
			Present value	Pre-war value	Present value	Pre-war value
Buildings	$1,956.16	$5,544.00	$3,912.32	$1,956.16	$3,912.32	$1,956.16
Docks, piles, foundations, frames, equipment, and appurtenances	10,166.82*	22,360.00	14,009.26	7,004.60*	16,087.79	6,435.12
Bridges and pontoons	*	5,828.50	.....	*	3,125.00	1,250.00
Totals	$12,122.98	$33,735.50	$17,921.58	$8,960.76	$23,125.11	$9,641.28

[fol. 15] From the above totals it will appear that the average value as of October 31st, 1918, of the Chestnut Street, Berkley, Terminals, above enumerated as fixed by the testimony introduced by the City of Portsmouth and the County of Norfolk, is the total sum of $20,526.34, whereas the total amount fixed by said majority report to be paid your petitioner for the said Chestnut Street, Berkley, Terminals, is the total sum of $12,122.98, which is the sum of $8,403.36 (or 40%) less than the value of said property as of said date.

It will further appear from the above that the value of said Chestnut Street, Berkley, Terminals, as fixed by said majority report, to-wit, $12,122.98, is but slightly in excess of the "pre-war" or "normal" value thereof fixed by witnesses introduced by the City of Portsmouth and the County of Norfolk, namely an average of $9,301.04, which is approximately one-half of the average value fixed by the said witnesses for the said property as of October 31st, 1918, the date fixed by said lease and said contract for the valuation of said property.

It will further appear from the testimony of witnesses, made a part of said majority report, that each of said witnesses introduced by The Ferries Company, the City of Portsmouth and the County of Norfolk, testified that the value as of October 31st, 1918, of each item of the said property herein referred to, was at least twice the "pre-war" value of the same property, and with respect to floating property, including the steamers and pontoons, the value as of October 31st, 1918, was two and one-half times the "pre-war" value thereof.

8. That the Bureau of Industrial Housing and Transportation upon taking possession of the property herein referred to advanced the rates of toll derived from the use of said property one hundred per cent, thereby increasing the producing power of said property a like amount over and above the revenue derived from the use of said property prior thereto.

[fol. 16] 9. That there is nothing contained in the contract to authorize said Board of Appraisers to value said property, except as of the date of the termination of the lease, in this case, the 31st day of October, 1918, and that an appraisal of said property as of a different date and at a value thereof as of a different date is not in accordance with the matters submitted to the judgment of said Board of Appraisers by the terms of said contract and is not binding upon the parties thereto or your petitioner.

10. That the valuation placed upon said property by said majority report, being based upon a mistaken view of the language contained in the contract and constituting the submission to said Board, is not binding upon the parties to said contract or your petitioner.

11. That there is nothing contained in said contract expressly submitting matters of law and fact nor the interpretation of said

contract to the judgment of said appraisers, and that their interpretation of said contract with respect to the matters submitted to their judgment, and with respect to the date which upon the value of said property should be determined, is erroneous, and that the valuations fixed in said majority report are not binding upon the parties to said contract, nor your petitioner.

12. That it was the duty of the appraisers appointed pursuant to the terms of the said lease and the said contract to inventory and value the property herein described as of October 31st, 1918; that the majority report referred to does not value the said property as of October 31st, 1918, but values the said property as of a different and indefinite date, and that in this respect the appraisers who have signed said majority report have not complied with the terms of said contract and that the said report is not binding on the parties to said contract or your petitioner.

13. That as set forth in the preceding paragraph No. 5 of this bill, and in said majority report and the transcript of evidence, made a part thereof, the total valuations placed upon the properties [fol. 17] herein referred to and complained of are as follows, namely:

The valuation fixed by the majority report.....	$131,240.03
The valuation as of October 31st, 1918, fixed by the witnesses introduced by the city of Portsmouth....	255,864.99
The valuation as of October 31st, 1918, fixed by the witnesses introduced by the County of Norfolk....	260,246.06
The valuation as of October 31st, 1918, fixed by the witnesses introduced by the Ferries Company.....	343,702.16

From the above it appears that the valuation fixed by said majority report is 51% of the valuation fixed by witnesses introduced by the City of Portsmouth; 50% of the valuation fixed by witnesses introduced by the County of Norfolk, and 38% of the valuation fixed by witnesses introduced by The Ferries Company, and is $157,364.37 less than, and 45% of, the average value fixed by all of the witnesses referred to; that in making their valuation as set forth in said majority report the appraisers signing the same made a mistake in the valuation placed upon the several properties so gross as to amount to a fraud upon your complainant.

14. Your petitioner further alleges that the appraisers appointed by the County of Norfolk and the City of Portsmouth, to-wit, J. Wiley Halstead and Charles F. Harper, as well as Cornelius Thomas, the fifth appraiser chosen by the two aforementioned and the appraisers appointed by The Ferries Company, were each of them tax payers in the City of Portsmouth and the County of Norfolk, and as such were not the disinterested appraisers required by the terms of the lease above referred to, and that by virtue thereof the said report is null and void and not binding upon your petitioner.

15. Your petitioner further alleges that by virtue of the personal interest of the appraisers, J. Wiley Halstead, Charles F. Harper and [fol. 18] Cornelius Thomas as tax payers in the County of Norfolk

and the City of Portsmouth, the said appraisers in fixing the valuation set forth in their report upon the property hereinabove referred to, served their personal interest without regard to the rights of your petitioner, and in so doing perpetrated a fraud upon your petitioner, and by virtue thereof their said report is null and void and not binding your petitioner.

16. Your petitioner further alleges that the action of only three of said appraisers is not binding on your petitioner.

17. Your petitioner further alleges that the terms of said contract do not permit the action of a majority only of said five appraisers to be binding on your petitioner and that a valuation unanimously agreed upon is necessary to constitute valid and binding action of said appraisers under the terms of said contract.

18. That the said property of your petitioners, which is now in the possession and control of the United States of America, under the terms of said contract bearing date the eighth day of October, 1918, with the United States of America, is of the value of Three Hundred and Forty-three Thousand Seven Hundred and Two and Sixteen Hundredths ($343,702.16) Dollars, and that your petitioner was the sole owner of said property at the time the same was taken by the United States by virtue of said contract, and that no assignment or transfer of the claim of your petitioner for the value of said property, or any portion thereof, or any interest therein, has ever been made, and that your petitioner is fully entitled to the said amount, the sum of Three Hundred and Forty-three Thousand Seven Hundred and Two and Sixteen Hundredths ($343,702.16) Dollars, after allowing all credits and just offsets, and your petitioner claims that said amount should be paid to it by the United States in order that it may receive just compensation for the said property under the terms of said contract.

[fol. 19] 19. Your petitioner further states that no action upon this claim has been taken before Congress or any department of the United States.

20. Whereof, your petitioner further states that the action of said appraisers as contained in said "Majority Report" be set aside and declared null and void for the reason hereinabove set forth, and that this honorable Court inquire into and fix the value of the property of your petitioner taken by the United States of America, as aforesaid, and render judgment against the United States of America for the value thereof, which your petitioner claims is the said sum of Three Hundred and Forty-three Thousand Seven Hundred and Two and Sixteen Hundredths ($343,702.16) Dollars, with interest thereon from the thirty-first day of October, 1918, until paid.

The Ferries Company, By John H. Rodgers, Vice-President. Hugh W. Davis, Attorney for Petitioner, National Bank of Commerce Building, Norfolk, Virginia. Of Counsel: Hicks, Morris, Garnett and Tunstall, Norfolk, Virginia. Hugh C. Davis and Hugh W. Davis, Norfolk, Virginia.

UNITED STATES OF AMERICA,
Eastern District of Virginia,
City of Norfolk, ss:

John H. Rodgers, being duly sworn, deposes and says: That he is the Vice-President and an officer of The Ferries Company, the Petitioner named in the foregoing Petition; that he has read the foregoing Petition, and the same is true to the best of his knowledge, information and belief; that the reason this verification is [fol. 20] not made by the Petitioner is that the Petitioner is a Corporation; that the grounds for deponent's belief as to all matters stated in said Petition, not stated upon his knowledge, are investigations which deponent has caused to be made concerning the subject-matter of this action, and information acquired by him in the course of his duties as an officer of the said corporation.

John H. Rogers.

Subscribed and sworn to before me, a Notary Public for the City of Norfolk and State of Virginia, on this 12th day of April, 1920. Mary Angela Pesce, Notary Public in and for the City of Norfolk and State of Virginia. (Seal.) My commission expires on the 18th of February, 1923. By the laws of the State of Virginia no tax is required on this seal.

EXHIBIT "A" TO PETITION

This indenture of lease, made this, the thirty-first day of March, A. D., nineteen hundred and nine, between The City of Portsmouth, acting by and through the Council of the said The City of Portsmouth, and the County of Norfolk, acting by and through the Board of Supervisors of the said County of Norfolk, parties of the first part; and R. E. Jordan, of the City of Norfolk, in the State of Virginia, party of the second part.

Whereas, by an act of the General Assembly of Virginia, as set forth and embodied in section one thousand three hundred and seventy-one, of the Code of Virginia, Edition eighteen hundred and eighty-seven, as amended by an act approved February 23rd, 1898, the said Council and Board of Supervisors are authorized, if they deem best for the interest of said city and county, after advertising the same for thirty days previous to the day of the lease, to lease out the Ferries which now ply, by authority of law, between the [fol. 21] cities of Portsmouth and Norfolk and Wellington Point, or Berkley, known as Norfolk County Ferries, or any part thereof, at public auction, to the highest bidder, for a term of ten years, at the expiration of which said term they may again lease the same, and continue to lease the same, for terms not exceeding ten years each, upon such terms and conditions as the said Council and Board of Supervisors shall determine, and may require bond or

bonds from the lessee or lessees in such sums as they may deem best for the faithful performance of the terms of the lease, and with securities deemed by them sufficient, which bond or bonds shall be made payable to The City of Portsmouth and Norfolk County; provided, that said Council and Board of Supervisors may lease out the said Ferries as a whole or in such parts as they may deem best for the interest of the said city and county; and provided further, that said Council and Board of Supervisors may arrange a schedule for the Ferries between the town of Berkley and the City of Norfolk and between the town of Berkley and the City of Portsmouth, different from that between the said Cities of Norfolk and Portsmouth, so as to make the trips between the said town of Berkley and said cities less frequent than those between the said cities, but in the event of a change of the present schedule the trips between the said town of Berkley and said cities shall not be less than twelve minutes.

And whereas, the said Council and Board of Supervisors, deeming it best for the interest of said city and county to lease out the said Ferries, at a meeting of said Council held on the eighteenth day of February, A. D., nineteen hundred and nine and at a meeting of the said Board of Supervisors held on the twenty-fourth day of February, A. D., nineteen hundred and nine, the action of said Council being approved by the Mayor of said City on the twenty-first day of February, nineteen hundred and nine, did agree and determine to lease out the property owned jointly by City of Portsmouth and Norfolk County as the Norfolk County Ferries, together with all the steamers, [fol. 22] boats, their apparel and appurtenances, and the wharves, docks, landings, buildings, and all other property now owned by said city and county, and now used, or subject to be used, for the uses and purposes of said Ferries, in accordance with sections one thousand three hundred and seventy-one as amended by an act of the General Assembly approved February 23rd, 1898, and one thousand three hundred and seventy-two of the Code of Virginia, Edition eighteen hundred and eighty-seven; subject to, and upon, the following terms and conditions, then agreed upon and determined by them, the said Council and Board of Supervisors, that is to say:

Conditions of Lease of the Norfolk County Ferries for the Term of Ten Years from the First Day of April, 1909

Rates of Toll

First. Foot passengers, single ticket 3 cents; two or more tickets, each 2½ cents.

Man and horse, single ticket 8 cents; two or more tickets, each 7½ cents.

Bicycle and rider, single ticket 5 cents; two or more tickets, each 5 cents.

Vehicle with one horse and driver (Norfolk and Portsmouth), single ticket 10 cents; two or more tickets, each 10 cents.

Vehicles with two horses and driver (Norfolk and Portsmouth), single ticket 18 cents, two or more tickets, each 17½ cents.

Vehicle with one horse and driver (Norfolk and Berkley), single ticket 8 cents; two or more tickets, each 7½ cents.

Vehicles with two horses and driver (Norfolk and Berkley), single ticket 13 cents; two or more tickets, each 12½ cents.

Vehicle with one horse and driver (Portsmouth and Berkley), single ticket 8 cents; two or more tickets, each 7½ cents.

[fol. 23] Vehicles with two horses and driver (Portsmouth and Berkley), single ticket 13 cents; two or more tickets, each 12½ cents.

Passenger automobiles or small automobiles vans, with one man each, between Norfolk and Porsmouth, Norfolk and Berkley or Portsmouth and Berkley, each 10 cents; large automobile vans, with one man, 18 cents.

Additional horses, each 5 cents.

Each additional person in vehicles pays an extra fare.

Vehicles exceeding twenty feet in length, double fare.

Vehicles loaded with lumber exceeding twenty feet in length, double fare.

Loaded vehicles weighing more than six thousand pounds are not carried.

Cattle, each, to be cared for by driver, 4 cents; hogs and sheep, each, to be cared for by driver, 2 cents.

Hand carts or hand carriages, to be cared for by attendant, each 5 cents; wheel-barrows, to be cared for by attendant, each 5 cents; a trunk, box, barrel or hamper basket, to be cared for by attendant, 5 cents.

Hand packages or packages usually carried in the hand or under the arm are not to be charged for.

No package of any kind is to be handled by ferry employees.

The price for carriage of any article not enumerated in this schedule is to be fixed by the lessee and the Joint Ferry Committee of the City and County.

Passenger Quarterly Tickets, $5 each.

Quarterly Tickets for passengers with bicycles, $8 each.

After the boat between Portsmouth and Berkley discontinues running at night the fare for passengers and teams between said points by way of Norfolk, shall be the same as between Portsmouth and Berkley direct.

Schedule of Trips

Second. Beginning with the first six months of the lease twelve minute trips shall be made between Norfolk and Portsmouth and Norfolk and Berkley Ward, from 6 o'clock A. M. to 10 o'clock P. M., [fol. 24] and fifteen minute trips from 10 o'clock P. M. to 12 o'clock mid-night; from 12 o'clock mid-night to 6 o'clock A. M. thirty minute trips between these points.

After the first six months of the lease ten minute trips shall be made between Norfolk and Portsmouth and Norfolk and Berkley Ward, from 6 o'clock A. M. to 12 o'clock mid-night; from 12 o'clock midnight to 6 o'clock A. M. thirty minute trips between these points.

Between Portsmouth and Berkley Ward for first six months of the lease there shall be twelve minute trips from 6 o'clock A. M. to 10 o'clock P. M. After the first six months of the lease there shall be ten minute trips between these points, from 6 o'clock A. M. to 10 o'clock P. M., provided said trips can be made with one boat, and of this fact that Joint Ferry Committee of the City Council and the Board of Supervisors shall determine, but should one boat be not able to make a ten minute schedule, then the best schedule that can be made with one boat shall be made which shall not, however, be less than twelve minutes. Provided, moreover, that if at any time after the first five years of the lease the City Council and the Board of Supervisors shall determine it to be necessary to run a boat between Portsmouth and Berkley Ward from 10 o'clock P. M. to 12 o'clock mid-night, a boat shall be so run, under the conditions named above for running one boat after the first six months of the lease.

Third. That all property turned over to the lessee is to be kept by him in good running order and condition.

Fourth. That all property turned over to the lessee, except the land, that is to say: all the buildings, boats and their appurtenances, and all movable property attached to and used in connection with said Ferries, shall be accepted and taken by the lessee upon the inventory and valuation thereof made by the board selected to make the inventory and valuation between the present outgoing lessees and the City and County, under the present existing lease; and at the [fol. 25] termination of the said lease, all the property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding lessee, should there be one, be inventoried and valued by a board of five disinterested persons, one of whom shall be chosen by the Board of Supervisors of the County, one by the Council of the City, one by the lessee, and one by the succeeding lessee, should there be a succeeding lessee, should there be no succeeding lessee then two shall be chosen by the lessee, and the four so chosen shall select the fifth, such inventory and valuation to be returned in quadruple, should there be a succeeding lessee; one copy to the Board of Supervisors of the County, one to the Council of the City, one to the lessee, and one to the succeeding lessee; and if such valuation shall be less than the valuation of the property turned over to him, the lessee shall pay to the City and County the amount of such deficiency; but if the valuation of the property turned over by him at the termination of his lease, shall be in excess of the valuation of the property turned over to him by them, at the commencement of his lease, then the said County and City shall pay to him the excess of such valuation, but the lessee shall turn over, at the expiration of said lease, good and sufficient boats to run the schedule as required by the lease and as herein above stated.

Payment of Rent

Fifth. The amount for which the said Ferries shall be leased shall be paid in monthly installments to the proper officers as required by law; and in the event of failure of the lessee to pay over and deposit any of the aforesaid monthly installments within ten days from the time the same shall become due and payable he shall forfeit and pay to the County $50 for each and every day, after ten days, that he is in arre-rs to the said County, and shall forfeit and pay to the City [fol. 26] $50 for each and every day, after said ten days, that he is in arrears to the said City.

Sixth. Should an opposition ferry be operated between Portsmouth and Norfolk or between Berkley and Norfolk, having a terminal within one-half mile of any ferry terminal of the Norfolk County ferries, whereby the receipts of the lessee are affected and reduced $10,000 or more per annum, then the lessee shall have the right to discontinue his lease or have his rental reduced as may be determined by the County and City. Should the County and City determine to reduce the rent, then the annual rental shall be reduced in proportion to the reduction of the gross receipts for each subsequent year from the receipts for the year previous to the year when the said opposition ferry commenced operation, said reduction in rental for any year to be deducted from the monthly installments of the rent for the months in the next succeeding year; and the lessee shall keep a correct and separate account of his gross receipts, derived from all sources under the lease; but before the said lessee shall receive any reduction in his rental on account of such opposition ferry he shall, if required so to do, submit to the representatives of the Ferry Committees of the County and City all books or separate accounts of his gross receipts so that the County and City may ascertain what reduction there is in said gross receipts and what reduction in rental the lessee is entitled to. But should the County and City determine not to reduce the rent then the lessee may discontinue his lease upon giving to the City and County six months' written notice of his intention to discontinue the same.

Seventh. The property leased is to be turned over and delivered to the lessee on the 1st day of April, 1909. And the City and County are to keep the said lessee in quiet and undisturbed possession of the same during the continuance of the lease.

Eighth. If, after said property shall be turned over to the lessee, there shall be any claim preferred against the steamers turned over [fol. 27] to the lessee on account of material or labor heretofore furnished the same, so as to create a lien in admiralty upon said steamers, then the said lessee, if he shall pay off the same, shall be entitled to credit the amount so paid to what he is to pay under the lease.

Ninth. Should the General Assembly of the State of Virginia by any future legislation, or should the City of Norfolk or City of Portsmouth enact any law or pass any ordinance increasing the tax or

laying any additional tax for the operation of the said ferries, over and above that in force for the year 1908, the annual rental for the lease of the said ferries shall be reduced in an amount equal to said increased or additional tax paid by the lessee, the same to be deducted from the monthly installments of rent next accruing after said increased or additional tax is paid; but the lessee shall allow the City of Portsmouth and County of Norfolk to contest the legality of any such increased or additional tax in the name of the lessee, and cooperate with the City and County in any such contest.

Tenth. The lessee is to enter into bond in the penalty of $100,000, payable to the County of Norfolk and City of Portsmouth, with a good and sufficient security to be approved by the Committees on Finance of the Board of Supervisors of Norfolk County and the Council of the City of Portsmouth, conditioned for the faithful performance of all the conditions of the lease, and said lease shall also at the same time the said contract is executed deposit in one or more banks in the Cities of Norfolk or Portsmouth an aggregate sum of not less than $5,000 to be expended on such improvements, alterations and betterments on the ferry property as may from time to time be agreed upon between the Ferry Committees of the said City and County and the said lessee, payment out of said funds only to be made by the check of the lessee, to which shall be attached the certificate of the Chairman of the Ferry Committees of the Council of the City of Portsmouth and Board of Supervisors of the County [fol. 28] of Norfolk, certifying that the amount of said check was expended for betterments or improvements to Ferry property, by and with the consent of the Ferry Committee of the said City and County. And the lessee shall forthwith deposit a sum equal to that drawn by said check so as to have on deposit at all times the sum of $5,000 for said improvements.

Eleventh. For failure to run a boat on schedule time the lessee shall forfeit the sum of $5.00 a trip, one-half to the City and one-half to the County, unless said failure is due to an act of Providence or to some unavoidable occurrence which could not be foreseen or prevented by the lessee.

Twelfth. Loads of vehicles are to be limited to six thousand pounds in weight.

Thirteenth. The approaches to the ferry boats are to be kept as clean as practicable, and boats and waiting rooms are to be well lighted, heated, ventilated and tidy, to satisfaction of the Joint Ferry Committee of the City and County; and any failure to observe the conditions of this section shall subject the lessee to a fine of $5.00 (one-half of the fine to go to the City and one-half to the County), after ten days' notice of said failure to the lessee or manager of the ferries by said Com-ittee.

Fourteenth. No boat shall be purchased by the lessee for the use of the Ferries where the expenditure exceeds $5,000, and no ferry-

house shall be built by the lessee for the use of the Ferries where the expenditure exceeds $2,500, without the consent of the Joint Ferry Committee of the Council of the City of Portsmouth and the Board of Supervisors of the County; and should such expenditures be made by the lessee without first obtaining such consent, then the boats and houses so purchased and built shall not be inventoried and valued under the provisions of the Fourth Clause of these conditions.

Fifteenth. The lessee shall at all times provide boats of sufficient capacity and of sufficient number to accommodate the traveling public.

[fol. 29] Sixteenth. The Committees reserve the right to reject any and all bids, and no bid shall be received until the person or persons making the same shall have deposited a certified check for the sum of five thousand dollars, payable to the Treasurer of the County of Norfolk and the Treasurer of the City of Portsmouth, to be forfeited upon his or their failure to comply with such bid or the term of the lease, but to be returned to such bidder upon his bid being rejected, or upon his compliance with the terms of said lease.

And whereas, R. E. Glover and H. L. Watts, representing the Council of the City of Portsmouth and Jno. A. Codd and L. M. Nicholas, representing the Board of Supervisors of Norfolk County, constituting the Joint Ferry Committee, duly appointed for the purpose, after advertising the same for thirty days previous to the day of lease in The Portsmouth Star, a daily newspaper published in the City of Portsmouth, and in other papers for shorter periods; setting forth in the said advertisement that the City of Portsmouth and the County of Norfolk, Virginia, would offer for lease, at public auction, in front of the courthouse door, in said City of Portsmouth, on Tuesday, March 30, 1909, at 12 o'clock M. the property owned jointly by the City and County known as the "Norfolk County Ferries" with its wharves, boats, docks, houses, and appurtenances, for a term of ten years, beginning April 1, 1909, according to the conditions agreed upon by the said Council and Board of Supervisors; which conditions were also fully set forth in the said advertisement, did, at twelve o'clock, M., on the thirtieth day of March, A. D. nineteen hundred and nine, in front of the court house door in the City of Portsmouth, offer for lease at public auction to the highest bidder, for a term of ten years, subject to, and upon, the terms and conditions so agreed upon and determined by said Council and Board of Supervisors and as above set forth, the said Ferries and property as also set forth and described, and as mentioned in said advertisement; at which said [fol. 30] public auction, the said Ferries and property were knocked off to R. E. Jordan, the said party of the second part, they being the highest bidders for the same, at an annual rental of One Hundred and Thirty-five Thousand Two Hundred Dollars, ($135,200.00).

And whereas, at a meeting of said Council, held on the thirteenth day of March, A. D., nineteen hundred and nine, the said R. E. Glover and H. L. Watts, the committee appointed by said Council to advertise and lease the said Ferries and property, reported said

lease to the council, and recommended that the same be confirmed; whereupon, the said Council, by resolution then adopted, confirmed the said lease as made and reported, and did authorize and direct C. W. Walker, President of the Board of Aldermen, and W. C. Corbitt, President of the Common Council, and L. P. Slater, City Clerk, to execute a proper deed, under the seal of the City of Portsmouth, for the said Ferries and property, to the said R. E. Jordan after he, the said R. E. Jordan, shall have executed his bond in the penalty of One Hundred Thousand Dollars as required by the tenth clause of said terms and conditions.

And whereas, at a meeting of the said Board of Supervisors held on the thirty-first day of March, A. D., nineteen hundred and nine, the said Jno. A. Codd and L. M. Nicholas, the committee appointed by the said Board of Supervisors to advertise and lease the said Ferries and property, reported said lease to the Board of Supervisors, and recommended that the same be confirmed; whereupon, the said Board of Supervisors, by resolution then adopted, confirmed the said lease so made and reported, and did authorize and direct Jno. A. Codd, Chairman of said Board, and Alvah H. Martin, its Clerk, to execute a proper deed under the seal of the Board of Supervisors, for said Ferries and property, to the said R. E. Jordan, after he, the said R. E. Jordan, shall have executed his bond in the penalty of One Hundred Thousand Dollars, as required by the tenth clause of said terms and conditions.

[fol. 31] And whereas, the said bond so required by the tenth clause of said terms and conditions has been duly executed by the said R. E. Jordan in the penalty of One Hundred Thousand Dollars, payable to the City of Portsmouth and Norfolk County, with good and sufficient security, approved by the Committees on Finance of the Council of the City of Portsmouth and of the Board of Supervisors of Norfolk County, conditioned for the faithful perf-rmance by him, the said R. E. Jordan, of all and every of said terms and conditions, and the provisions of the said lease.

Now, therefore, this indenture witnesseth, that for and in consideration of the rents, provisions, agreements, terms and conditions above set forth, which on the part of the said R. E. Jordan is to be paid, done and performed, they the said City of Portsmouth, acting by and through the Council of said City of Portsmouth, and the said County of Norfolk, acting by and through the Board of Supervisors of said Norfolk County, have demised and leased, and do hereby demise and lease, unto the said R. E. Jordan, subject to all and every of the terms and conditions above set forth, the following property, to-wit:

The property owned jointly by the City of Portsmouth and Norfolk County, known as The Norfolk County Ferries, together with all the steamers, boats, their apparel and appurtenances, and the wharves, docks, landings, buildings and all other property now owned by the said City and County, and now used or subject to be used for the uses and purposes of the said Ferries.

To have and to hold the same unto him, the said R. E. Jordan,

from the first day of April, A. D. nineteen hundred and nine, for and during the full term of ten years next ensuing and fully to be completed and ended, yielding and paying therefor, yearly, the sum of One Hundred and Thirty-five Thousand Two Hundred Dollars ($133,200.00), good and lawful money of the United States, payable [fol. 32] in monthly installments of Eleven Thousand Two Hundred and Sixty-six Dollars and Sixty-six and Two-thirds Cents ($11,266.66 2-3), at the end of each and every month, during the continuance of said lease, the same to be paid by the said R. E. Jordan, one-half thereof to the Treasurer of Norfolk County, and the other half thereof to the Treasurer of the City of Portsmouth.

And the said R. E. Jordan for himself, his heirs, executors, administrators and assigns, does hereby covenant to and with the said City of Portsmouth and Norfolk County, that he shall and will pay the said yearly rent of One Hundred and Thirty-five Thousands Two Hundred Dollars ($135,200.00), in the same manner hereinbefore limited and appointed, and he, the said R. E. Jordan, himself, his heirs, executors, administrators and assigns does hereby further covenant that he shall and will on his part faithfully observe, keep and perform all and every of the provisions, agreements, terms and conditions agreed upon and determined by said Council and Board of Supervisors and herein above set forth, on his part to be observed, kept and performed; and the said City of Portsmouth and Norfolk County do, on their part, covenant that they will faithfully observe, keep and perform all and every of the provisions, agreements, terms and conditions herein above set forth, on their part to be observed, kept and performed.

In testimony whereof, witness, in triplicate, the signature of the said C. W. Walker, President of the Board of Aldermen of the City of Portsmouth, W. C. Corbitt, President of the Common Council of the City of Portsmouth, with the seal of the said City of Portsmouth hereto affixed, attested by L. P. Slater, Clerk of said Council; and the signature of Jno. A. Codd, Chairman of the Board of Supervisors of the County of Norfolk, with the seal of said Board of Supervisors of the County of Norfolk hereby affixed, attested by Alvah H. Martin, Clerk of said Board of Supervisors; and the signature and seal of the said R. E. Jordan.

[fol. 33] City of Portsmouth, By C. W. Walker, President of the Board of Aldermen. By W. C. Corbitt, President of the Common Council. (Seal.) Attest: L. P. Slater, City Clerk. (Seal.) Norfolk County, By Jno. A. Codd, Chairman of the Board of Supervisors. R. E. Jordan. Attest: Alvah H. Martin, Clerk. (Seal.)

CITY OF PORTSMOUTH, *To wit:*

I, Jno. W. Happer, a commissioner in chancery for the Circuit Court for the City aforesaid in the State of Virginia, do certify that C. W. Walker, President of the Board of Aldermen of the City of Portsmouth, W. C. Corbitt, President of the Common Council of the City of Portsmouth, L. P. Slater, City Clerk for the City of Ports-

mouth, John A. Codd, Chairman of the Board of Supervisors of Norfolk County, Alvah H. Martin, Clerk of said County, R. E. Jordan, whose names are signed to the writing above bearing date on the thirty-first day of March, nineteen hundred and nine, have acknowledged the same before me in my city aforesaid.

Given under my hand this thirty-first day of March, 1909.

Jno. W. Happer, Commissioner in Chancery.

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk on the 6th Day of May, 1910

This deed was this day received, and upon the Certificate of acknowledgement thereto annexed admitted to record.

[fol. 34] Teste: James V. Trehy, Clerk, By Cora G. Griffin, Dy. Clerk.

VIRGINIA:

In the Clerk's Office of the Court of Hustings for the City of Portsmouth May 9th, 1910

This Deed was Presented in office and with the Certificates annexed admitted to record.

Teste: E. Thompson, Clerk.

EXHIBIT "B" TO PETITION

Contract Between the City of Portsmouth, the County of Norfolk, the Ferries Company, Incorporated, and the United States of America, Acting by The Bureau of Industrial Housing and Transportation of the Department of Labor.

(Operation of Norfolk County Ferries)

October 8, 1918

This contract made this 8th day of October, 1918, between the City of Portsmouth, acting by and through the Council of the City of Portsmouth, and the County of Norfolk, acting by and through the Board of Supervisors of the County of Norfolk, parties of the first part; the Ferries Company, Incorporated, a Corporation organized and existing under the laws of Virginia, hereinafter called the Ferries Company, party of the second part, and the United States of America, acting by The Bureau of Industrial Housing and Transportation of the Department of Labor, under the authority of the President and the Secretary of Labor, hereinafter called The Bureau, party of the third part, witnesseth:

Whereas, it is desired by all parties hereto that The Bureau, on behalf of the United States Government, take over the operation of the Norfolk County Ferries; and

[fol. 35] Whereas, it is necessary, in connection therewith, that the present lease of the said Ferries, now held by the party of the second part, should be terminated as of the time that the operation of said ferries is taken over by The Bureau.

Now, therefore, in consideration of the mutual promises and covenants in this agreement contained, it is agreed by and between the parties hereto, as follows:

First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk and now held by the Ferries Company, dated March 31, 1909, shall terminate as of the time that The Bureau shall take over the operation of said ferries, in the same manner and to the same effect as if such time had been originally fixed in said lease as the time for the termination thereof;

Second. That the appraisal of the ferries' properties, so provided for in said lease, shall take place as of the time that the ferries shall be taken over by The Bureau instead of at the regular termination of the said lease, as therein provided and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by The Bureau, as aforesaid.

Third. That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, as a result of the said appraisal mentioned above, then such amount shall be paid to the Ferries Company by The Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and if any moneys shall be due the City of Portsmouth and the County of Norfolk by the Ferries Company as a result of said appraisal, then the Ferries Company shall pay such amount to The Bureau instead of paying same to the City of Portsmouth and the County of Norfolk, and The [fol. 36] Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them, of even date herewith.

Fourth. It is specifically understood, however, that all leases made by the party of the second part to sub-tenants for stores and stands shall for the period of the original lease, that is, until April 1, 1919, be binding on the parties of the first part and the parties of the first part shall be entitled to all rents and other profits accruing therefrom after the date that The Bureau takes over the ferries, as aforesaid, which sums shall be collected by The Bureau, as part of the receipts of the ferries, as provided in the contract between it and the parties of the first part of even date herewith.

In witness whereof, the City of Portsmouth has caused this instrument to be executed in its name and on its behalf by J. T. Hanvey, the President of the Council of the City of Portsmouth and its Corporate Seal to be hereunto affixed, attested by L. C. Brinson, Clerk of said Council, thereunto duly authorized by resolution of said Council passed on October 10th, 1918, and the County of Norfolk has caused this instrument to be executed in its name and on its behalf by W. H. Rodman, the Chairman of the Board of Supervisors of the County of Norfolk and the seal of said Board of Supervisors to be hereunto affixed, attested by G. Taylor Gwathmey, Clerk of said Board *or* Supervisors, thereunto duly authorized by resolution of said Board passed October 11th, 1918, and the Ferries Company, Incorporated, has caused this instrument to be executed in its name and on its behalf by T. A. Brittingham, its President and its corporate seal to be hereunto affixed, attested by W. W. Etheridge, its Secretary, thereunto duly authorized by resolution of its Board of Directors passed on October 8, 1918, and the United States of America, acting by The Bureau of Industrial Housing and Transportation of the Department of Labor, has caused this instrument to be executed in its name and on its behalf, by the Director of said Bureau, all in [fol. 37] quadruplicate, the day and year first above written.

City of Portsmouth, Va., By —— ——, Pres. of the Council. Attest: —— ——, Clerk of Council. County of Norfolk, Va., By —— ——, Chairman Board of Supervisors of County of Norfolk. Attest: —— ——, Clerk of Board of Supervisors of County of Norfolk. The Ferries Company, Inc., By —— ——, President. Attest: —— ——, Secretary. United States of America, By the Bureau of Industrial Housing and Transportation, By —— ——, Director.

[fol. 38] II. General Traverse—Filed June 14, 1920

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. Argument and Submission of Case

On June 11, 1922, this case was argued and submitted by Messrs. Hugh W. Davis and W. R. C. Taylor, for the plaintiff, and by Messrs. L. A. Smith and A. B. Carney, for the defendant.

[fol. 39] IV. FINDINGS OF FACT AND CONCLUSION OF LAW—Filed June 5, 1922

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, The Ferries Company, is a corporation organized and existing under the laws of the State of Virginia, and having its principal place of business in said State of Virginia. Said company has at all times borne true allegiance to the United States.

II

Under date of March 31, 1909, the City of Portsmouth and the County of Norfolk, in said State of Virginia, owners of the properties known as the Norfolk County Ferries, operating between the cities of Norfolk, Portsmouth and Berkeley, Virginia, leased said properties, consisting of steamers, boats, and their equipment, apparel and appurtenances, together with wharves, docks, landings and buildings, to one R. E. Jordan for a term of ten years beginning on the 1st of April, 1909. A copy of said lease is annexed to the plaintiff's petition as Exhibit A, and is by reference made a part of these findings of fact.

III

Said lease, among other things, provided as follows:

"Third. That all property turned over to the lessee is to be kept by him in good running order and condition.

"Fourth. That all property turned over to the lessee, except the land, that is to say: (all the buildings, boats and their appurtenances, and all movable property attached to and used in connection with said Ferries) shall be accepted and taken by the lessee upon the inventory and valuation thereof made by the board (selected to make the inventory and valuation between the present outgoing lessees and the City and County, under the present existing lease;) and at the termination of the said lease, all the property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding [fol. 40] lessee, should there be one, be inventoried and valued by a board of five disinterested persons, (one of whom shall be chosen by the Board of Supervisors of the County, one by the Council of the City, one by the lessee, and one by the succeeding lessee, should there be a succeeding lessee, should there be no succeeding lessee then

two shall be chosen by the lessee, and the four so chosen shall select the fifth, such inventory and valuation to be returned in quadruple, should there be a succeeding lessee; one copy to the Board of Supervisors of the County, one to the Council of the City, one to the lessee, and one to the succeeding lessee; and if such valuation shall be less than the valuation of the property turned over to him, the lessee shall pay to the City and County the amount of such deficiency; but if the valuation of the property turned over to him at the termination of his lease shall be in excess of the valuation of the property turned over to him by them at the commencement of his lease, then the said County and City shall pay to him the excess of such valuation, but the lessee shall turn over, at the expiration of said lease, good and sufficient boats to run the schedule as required by the lease and as herein above stated."

IV

Soon after the execution of said lease the said R. E. Jordan assigned all his rights and interest thereunder to The Ferries Company, the plaintiff in this cause, by which company the said ferries property was operated under said lease.

Under date of October 8, 1918, a contract was entered into by and between the said City of Portsmouth and Norfolk County, parties of the first part; the said Ferries Company, party of the second part; and the United States, acting by the Bureau of Industrial Housing and Transportation of the Department of Labor, party of the third part, providing for the termination of the said lease of said ferries property, for the purpose of the leasing and operation of said property by the United States through said Bureau of Industrial Housing and Transportation. A copy of said contract is annexed to the plaintiff's petition as Exhibit B, and is by reference made a part of these findings of fact.

Said contract of October 8, 1918, contained, among other things, the following provisions:

"Now, therefore, in consideration of the mutual promises and covenants in this agreement contained, it is agreed by and between [fol. 41] the parties hereto, as follows:

"First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk, and now held by the Ferries Company, dated March 31, 1909, shall terminate as of the time that the Bureau shall take over the operation of said ferries, in the same manner and to the same effect as if such time had been originally fixed in said lease as the time for the termination thereof.

"Second. That the appraisal of the ferries properties so provided for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided and said appraisal shall be made

in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau, as aforesaid.

"Third. That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, as a result of the said appraisal mentioned above, then such amount shall be paid to the Ferries Company by the Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and if any moneys shall be due the City of Portsmouth and the County of Norfolk by the Ferries Company as a result of said appraisal, then the Ferries Company shall pay such amount to the Bureau instead of paying same to the City of Portsmouth and the County of Norfolk, and the Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them of even date herewith."

V

Pursuant to the said agreement of October 8, 1918, the said lease of the ferries properties dated March 31, 1909, was terminated and said properties taken over and their operation entered upon by the United States, through said Bureau of Industrial Housing and Transportation, on November 1, 1918.

VI

Pursuant to the provisions of the said lease of March 31, 1909, and of the said contract of October 8, 1918, submitting the question of the value of the said ferries properties to a board of appraisers, W. W. Colonna, and J. M. Emory were chosen by the plaintiff, J. Wiley Halstead was chosen by the City of Portsmouth, and Charles F. Harper was chosen by the County of Norfolk as members of said board, and these four unanimously chose Cornelius Thomas as the fifth member of the board. Of these five members of said board, three of them, Colonna, Halstead and Harper were taxpayers either [fol. 42] in the City of Portsmouth or in the County of Norfolk. None of the members of said board had any personal interest, other than as taxpayers, in said ferries properties.

VII

The said board of appraisers, after a hearing of testimony on the question of the value of said properties, submitted a majority report as to said value, which was concurred in by three members of the board, namely, Harper, Halstead and Thomas; and the remaining two members of the board, Colonna and Emery, submitted a minority report nonconcurring in said majority report on the ground that the valuation of said properties in said report was not the real value thereof as of October 31, 1918, but was a theoretical 'normal" or "prewar" value, except as to the value of certain paving, the ferry steamer "Winthrop" and of supplies on hand, amounting in all to $33,688.65.

VIII

The appraised value of the said ferries properties as and when turned over to the said R. E. Jordan, lessee, under the said lease of March 31, 1909, was $152,274.40.

The appraised value of said properties as of date October 31, 1918, when they were turned over by the plaintiff company to the United States, as determined by the said board of appraisers referred to in Finding VII, was $164,928.68, which valuation, with the exceptions stated in Finding VII, was based upon pre-war conditions and values, and not upon conditions and values existing and prevailing on said October 31, 1918.

The value of said properties on a war basis of values and prices when turned over by the plaintiff company to the United States on October 31, 1918, was $289,575.80.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein be and the same is dismissed for want of jurisdiction.

Judgment is rendered against the plaintiff for the cost of printing herein, the amount thereof to be entered by the Clerk and collected by him according to law.

[fol. 43] V. JUDGMENT OF THE COURT—Filed June 5, 1922

At a Court of Claims held in the City of Washington on the 5th day of June, 1922, judgment was ordered to be entered — follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Eighty-three Dollars and twenty-one cents ($83.21), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VI. PROCEEDINGS AFTER THE ENTRY OF JUDGMENT—Jan. 8, 1923

On July 13, 1922, the plaintiff filed a motion for a new trial. On January 8, 1923, said motion was overruled by the Court.

[fol. 44] VII. STIPULATION OF COUNSEL RELATIVE TO OMISSION OF EXHIBITS FROM RECORD ON APPEAL—Filed Mch. 26, 1923

It is hereby stipulated and agreed between counsel for the respective parties hereto that the Clerk of the Court of Claims, in preparing

the transcript of record on appeal to the Supreme Court of the United States may omit Exhibits C and D attached to and made a part of the claimant's petition.

Robert H. Lovett, Assistant Attorney General for the United States. Hugh W. Davis, Attorney for Plaintiff. L. A. S.

NOTE.—There is omitted from the record plaintiff's Exhibits C and D in conformity to the foregoing stipulation.

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed March 26, 1923

Now comes the plaintiff, in the above-entitled cause, and moves the Honorable Court for the allowance of an appeal from the decision of this court of June 5, 1922, plaintiff's motion for a new trial having been overruled by this court on January 8, 1923.

Respectfully submitted, Hugh W. Davis, Attorney for Plaintiff.

[fol. 45] IX. ORDER OF COURT ALLOWING APPEAL—Filed April 2, 1923

It is ordered by the court that the plaintiff's application for appeal to the Supreme Court of the United States be and the same is allowed.

COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law entered by the court; of the judgment of the Court; of the plaintiff's application for appeal to the Supreme Court of the United States; of the order of court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifth day of April, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,557. Court of Claims. Term No. 298. The Ferries Company, appellant, vs. The United States of America. Filed April 16th, 1923. File No. 29,557.

APPELLANTS

BRIEF

IN THE

Supreme Court of the United States

No. 298.

THE FERRIES COMPANY, Appellant,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The most concise and appropriate statement of the facts of this case is contained in the Findings of Fact made by the honorable Court of Claims (R. 24) namely:

"I. The plaintiff, The Ferries Company, is a corporation organized and existing under the laws of the State of Virginia, and having its principal place of business in said State of Virginia. Said company has at all times borne true allegiance to the United States.

"II. Under date of March 31, 1909, the City of Portsmouth and the County of Norfolk, in said State of Virginia, owners of the properties known as the Norfolk County Ferries, operating between the cities of Norfolk, Portsmouth, and Berkley, Virginia, leased said properties, consisting of steamers, boats, and their equipment, apparel and appurtenances, together with wharves, docks, landings and buildings, to one R. E. Jordan for a term of ten years beginning on the 1st of April, 1909. A copy of said lease is annexed to the plaintiff's petition as Exhibit A, and is by reference made a part of these findings of fact.

"III. Said lease, among other things, provided as follows:

" 'Third. That all property turned over to the lessee is to be kept by him in good running order and condition.

" 'Fourth. That all property turned over to the lessee, except the land, that is to say: all the buildings, boats and their appurtenances, and all movable property attached to and used in connection with said Ferries, shall be accepted and taken by the lessee upon the inventory and valuation thereof made by the board selected to make the inventory and valuation between the present outgoing lessees and the City and County, under the present existing lease; and at the termination of the said lease, all the property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding (fol.40) lessee, should there be one, be inventoried and valued by a board of five disinterested persons, one of whom shall be chosen by the Board of Supervisors of the County, one by the Council of the City, one by the lessee, and one by the succeeding lessee, should there be a succeeding lessee; should there be no succeeding lessee then two shall be chosen by the lessee, and the four so chosen shall select the fifth, such inventory and valuation to be returned in quadruple, should there be a succeeding lessee; one copy to the Board of Supervisors of the County, one to the Council of the City, one to the lessee, and one to the succeeding lessee; and if such valuation shall be less than the valuation of the property turned over to him, the lessee shall pay to the City and County the amount of such deficiency; but if the valuation of the property turned over to him at the termination of his lease shall be in excess of the valuation of

the property turned over to him by them at the commencement of his lease, then the said County and City shall pay to him the excess of such valuation, but the lessee shall turn over, at the expiration of said lease, good and sufficient boats to run the schedule as required by the lease and as herein above stated.'

"IV. Soon after the execution of said lease the said R. E. Jordan assigned all his rights and interest thereunder to The Ferries Company, the plaintiff in this cause, by which company the said ferries property was operated under said lease.

"Under date of October 8, 1918, a contract was entered into by and between the said City of Portsmouth and Norfolk County, parties of the first part; the said Ferries Company, party of the second part; and the United States, acting by the Bureau of Industrial Housing and Transportation of the Department of Labor, party of the third part, providing for the termination of the said lease of said ferries property, for the purpose of the leasing and operation of said property by the United States through said Bureau of Industrial Housing and Transportation. A copy of said contract is annexed to the plaintiff's petition as Exhibit B, and is by reference made a part of these findings of fact.

"Said contract of October 8, 1918, contained, among other things, the following provisions:

" 'Now, therefore, in consideration of the mutual promises and covenants in this agreement contained, it is agreed by and between (fol. 41) the parties hereto, as follows:

" 'First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk, and now held by the Ferries Company, dated March 31, 1909, shall terminate as of the time that the Bureau shall take over the oper-

ation of said ferries, in the same manner and to the same effect as if such time had been originally fixed in said lease as the time for the termination thereof.

" 'Second. That the appraisal of the ferries properties so provide for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau, as aforesaid.

" 'Third. That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, as a result of the said appraisal mentioned above, then such amount shall be paid to the Ferries Company by the Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and if any moneys shall be due the City of Portsmouth and the County of Norfolk by the Ferries Company as a result of said appraisal, then the Ferries Company shall pay such amount to the Bureau instead of paying same to the City of Portsmouth and the County of Norfolk, and the Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them of even date herewith.'

"V. Pursuant to the said agreement of October 8, 1918, the said lease of the ferries properties dated March 31, 1909, was terminated and said properties taken over and their operation entered upon by the United States, through said Bureau of Industrial Housing and Transportation, on November 1, 1918.

"VI. Pursuant to the provisions of the said lease of March 31, 1909, and of the said contract of October 8, 1918, submitting the question of the

value of the said ferries properties to a board of appraisers, W. W. Colonna, and J. M. Emory were chosen by the plaintiff, J. Wiley Halstead was chosen by the City of Portsmouth, and Charles F. Harper was chosen by the County of Norfolk as members of said board, and these four unanimously chose Cornelius Thomas as the fifth member of the board. Of these five members of said board, three of them, Colonna, Halstead and Harper, were taxpayers either (fol. 42) in the City of Portsmouth or in the County of Norfolk. None of the members of said board had any personal interest, other than as taxpayers, in said ferries properties.

"VII. The said board of appraisers, after a hearing of testimony on the question of the value of said properties, submitted a majority report as to said value, which was concurred in by three members of the board, namely, Harper, Halstead and Thomas; and the remaining two members of the board, Colonna and Emory, submitted a minority report nonconcurring in said majority report on the ground that the valuation of said properties in said report was not the real value thereof as of October 31, 1918, but was a theoretical "normal" or "pre-war" value, except as to the value of certain paving, the ferry steamer "Winthrop" and of supplies on hand, amounting in all to $33,688.65.

"VIII. The appraised value of the said ferries properties as and when turned over to the said R. E. Jordan, lessee, under the said lease of March 31, 1909, was $152,274.40.

"The appraised value of said properties as of date October 31, 1918, when they were turned over by the plaintiff company to the United States, as determined by the said board of appraisers referred to in Finding VII was $164,928.68, which valuation, with the exceptions stated in Finding VII, was based upon pre-war conditions and values, and not upon conditions and values existing and prevailing on said October 31, 1918.

"The value of said properties on a war basis of values and prices when turned over by the plaintiff company to the United States on October 31, 1918, was $289,575.80."

Upon the foregoing Findings of Fact the honorable Court of Claims found "as a conclusion of law that the petition herein be and the same is dismissed for want of jurisdiction," and entered its judgment accordingly (R. 27).

From this judgment appeal was allowed to this honorable Court.

The two questions involved are (1) the jurisdiction of the Court below upon the foregoing state of facts (2) the amount for which the appellant is entitled to judgment.

ARGUMENT.

1. Jurisdiction of the United States Court of Claims.

Appellant's Claim Founded on Express Contract with United States.

The Judicial Code, section 145, pertaining to the Court of Claims, approved March 3, 1911 (36 Stat. L. 1135), provides:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: PROVIDED, HOWEVER, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War and commonly known as "war claims," or to hear and determine other claims which,

prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

The claim of the appellant is founded upon an express contract with the Government of the United States, namely, the contract of October 8, 1918, set forth in Findings of Fact No. IV (Supra). This contract provides "that the appraisal of the ferries properties so provided for in said lease" should take place as herein provided, save that such appraisal should be made "as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease" (Findings of Fact No. IV Supra). The succeeding provision of the contract constitutes a clear cut contract of novation, establishes a direct contractual obligation binding upon the United States of America, and is the basis of jurisdiction in the Court of Claims, namely:

> "That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, as a result of the said appraisal mentioned above, then such amount shall be paid to the Ferries Company by the Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and if any moneys shall be due the City of Portsmouth and the County of Norfolk by the Ferries Company as a result of said appraisal, then the Ferries Company shall pay such amount to the Bureau instead of paying same to the City of Portsmouth and the County of Norfolk, and the Bureau shall credit the City of Portsmouth and the County of Norfolk therewith, as provided in its agreement with them of even date herewith."

It was contended by the Government in the Court of Claims that by reason of the right reserved by the Government to charge to the City of Portsmouth and

the County of Norfolk any amounts paid to the Ferries Company by the Bureau under the terms of the foregoing contract, that the Government would escape liability to the Ferries Company. It must be noted, however, first, that the Ferries Company was no party to the supplemental contract of the Government with the City of Portsmouth and the County of Norfolk, and second, that although it had been a party to such contract, the direct obligation and responsibility of the Government to pay to the Ferries Company the amount due it for the property turned over by it to the Government remained intact under the express terms of the agreement. The existence, however, of such a supplemental contract is not found as a fact by the Court of Claims, nor is such a supplemental contract a part of the record of this case. Assuming, however, that such a contract existed, was before this honorable Court and provided in terms that the City of Portsmouth and the County of Norfolk should be indebted to the Bureau for such amounts as the Bureau should pay to the Ferries Company as the result of the appraisal contemplated by the contract of October 8, 1918, the obligation and contractual liability of the Government to the Ferries Company would not be in any way lessened thereby. Even assuming that the two contracts were read together and construed to create the Government the mere agent of the City of Portsmouth and the County of Norfolk in entering into the contract of October 8, 1918, with the Ferries Company, the Government's contractual liability and obligation to the Ferries Company would not be affected thereby, for it is the well established rule that when it appears from the face of a contract that an agent intends to make himself personally liable, such liability is fixed by the terms of the contract, notwithstanding the added liability of the principal.

Whitman v. *Wyman*, 101 U. S. 392;
Sun Printing & Publishing Assn. v. *Moore*, 183 U. S. 647.

Such intention is conclusively shown by the provision of the contract (supra), namely: "That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk as a result of such appraisal mentioned above, then such amount *shall be paid to the* Ferries Company *by the* Bureau and charged by *it* to the City of Portsmouth." (Italics ours).

It appears from the foregoing Findings of Fact No. V that pursuant to the agreement between the Ferries Company and the United States of America dated October 8, 1918, the said lease of the Ferries properties dated March 31, 1909, was terminated, and said properties taken over and their operation entered upon by the United States on November 1, 1918.

It further appears from Findings of Fact No. VIII (supra) that upon the completion of the appraisal the state of account between the Ferries Company and the United States was necessarily as follows:

ON MAJORITY APPRAISERS THEORY OF PRE-WAR VALUE (Government's Contention).		
Pre-war value of property taken by Government (Findings VIII) found by majority appraisers	$164,928.68	
Credit for property originally acquired by plaintiff	152,274.40	
Balance due plaintiff from U. S. Government under its contract with plaintiff (Findings IV) on pre-war basis of value		$12,654.28

ON BASIS OF ACTUAL VALUE AT TIME FIXED BY GOVERNMENT'S CONTRACT WITH PLAINTIFF.		
Actual value of property taken by Government on Oct. 31, 1918, (date fixed by contract) (Findings VIII)	$289,575.80	
Credit for property originally acquired by plaintiff	152,274.40	
Balance due plaintiff from U. S. Government under its contract with plaintiff (Findings IV) on basis of actual value at time fixed by said contract		$137,301.40

From the foregoing it appears that upon either of the two theories of appraisal involved in this case the United States is indebted to the appellant for a claim in an ascertained amount founded upon an express contract.

At no stage in this proceeding has the United States denied its liability to the appellant in the lesser amount of $12,654.28 (Supra), whereas throughout the proceedings the appellant has claimed liability to it in the greater amount, namely $137,301.40 (Supra).

It is therefore respectfully submitted that all of the requirements of jurisdiction set forth in the statute law (Supra P. 6) are met in this case.

Furthermore the ends of justice require that judgment be rendered for the plaintiff in proper amount to be determined by this Court, for otherwise the appellant will by virtue of its contract of October 8, 1918,

(Supra), be deprived of its properties by the United States without payment by the United States of the agreed purchase price thereof and without opportunity to obtain compensation therefor from other sources in that there is no contractual obligation on the part of the City of Portsmouth or the County of Norfolk to pay therefor.

Equity Jurisdiction of Court of Claims and Duty to Re-appraise Property and Give Judgment in Correct Amount.

The Court of Claims has equitable jurisdiction, *William Cramp, etc., Building Company* v. *United States,* 239 U. S. 221; *United States* v. *Millikin Imprinting Company,* 202 U. S. 168.

It is the function of a Court of Equity to set aside an appraisal or award where the appraisers or arbitrators have a mistaken view of the meaning of the language contained in the contract of submission, *Switcher* v. *Dunn,* 89 Kan. 412, 131 Pac. 571, 45 L. R. A. (N. S.) 810; *Moore* v. *Luckers* (Va.) 23 Gratt. 160; *McLaurin* v. *McLauchlin,* (C. C. A.) 215 Federal 345; 5 Corpus Juris 197, Sec. 503 and cases cited; *Chicago, M. & St. Paul R. Co.* v. *Stewart,* 19 Fed. 5.

The above cases apply to arbitrators whose powers are semi-judicial. A fortiori they apply to the findings of appraisers whose duties are ministerial. *William H. Low Estate Company* v. *Lederer Realty Company,* 35 R. I. 352, 86 Atl. 881.

The gist of the appellant's contention in the Court of Claims is contained in Paragraphs 9 and 10 of its petition filed in the Court of Claims, as follows:

"9. That there is nothing contained in the contract to authorize said Board of Appraisers to value said property, except as of the date of the termination of the lease, in this case, the 31st day of October, 1918, and that an appraisal of said property as of a different date

and at a value thereof as of a different date is not in accordance with the matters submitted to the judgment of said Board of Appraisers by the terms of said contract and is not binding upon the parties thereto or your petitioner.

"10. That the valuation placed upon said property by said majority report, being based upon a mistaken view of the language contained in the contract and constituting the submission to said Board, is not binding upon the parties to said contract or your petitioner."

The facts found by the Court of Claims fully sustain these allegations (Findings of Fact No. VIII Supra), namely:

"The appraised value of said properties as of date October 31, 1918, when they were turned over by the plaintiff company to the United States, as determined by the said board of appraisers referred to in Finding VII, *was based upon pre-war conditions and values, and not upon conditions and values existing and prevailing on said October 31, 1918* (italics ours).

"The value of said properties on a *war basis of values and prices when turned over by the plaintiff company to the United States* on October 31, 1918, was $289,575.80." (Italics ours).

The Court of Claims having found as a fact (Supra) that the majority appraisers based their appraisal "upon pre-war conditions and values and *not upon* conditions and *values existing* and prevailing *on said October 31, 1918,*" together with the contract of October 8, 1918, (Supra) whereby the Government agreed that such appraisal should "take place *as of the time that the ferries should be taken over* by the Bureau instead of at the regular termination of said lease as therein provided" clearly establish the fact that the appraisal and award was not made in accordance with the terms of the contract of submission.

But laying aside the express provision of the con-

tract of submission, namely, that the value of the property should be fixed "as of the time that the ferries should be taken over by the Bureau," October 31, 1918, an appraisal on that date on the basis of pre-war prices and values would have been contrary to the decision of this honorable Court in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 52, and to the Virginia law (governing this Virginia contract) as expressed in *Petersburg Gas Co.* v. *City of Petersburg*, 132 Va. 82.

It is therefore respectfully submitted that such appraisal and award should have been set aside by reason of the appraisers' misinterpretation of the language contained in the contract of submission.

Jurisdiction Being Established Complete Relief Should Be Afforded.

Upon the principle that equity having once taken jurisdiction will grant complete relief it is well established that where appraisal or award is set aside a Court of Equity will proceed to reform the same rather than return the matter for further procedure by appraisers or arbitrators; *Low Estate* v. *Lederer Realty Co.* Supra; *Lowe* v. *Brown*, 22 Ohio State 463; *Conger* v. *Ensler*, 83 N. Y. Sup. 419; *Coons* v. *Coons* 95 Va. 434, 28 S. E. 885; 1 Pom. Eq. Jur. Sec. 236.

The contract of October 8, 1918, was to be performed in the State of Virginia. In *Petersburg Gas Co.* v. *City of Petersburg*, Supra., it was held that there was a fundamental error in the decision of the State Corporation Commission in taking the pre-war unit of prices as the sole basis for ascertaining the fair value of the property of a gas company for rate making purposes. The contract entered into by the United States of America with the appellant, which is now sued upon, was entered into in October, 1918, contemplated the immediate taking over and appraisement of the properties, and expressly provided that the valuation should be made as of the time

of taking and not as of some other time. The Court will take judicial notice that a so-called "war basis of values and prices" existed in full force throughout the period from October 8 to October 31, 1918, and the conclusion is inescapable that it was contemplated by the parties to this contract, and was a fundamental consideration for the execution of same by the appellant, that its property would be paid for on such basis. Otherwise the use of the language in the contract specifically designating the basis of value, namely "as of the time" of taking, would be inexplicable.

The Court of Claims having found the value of said property as of October 31, 1918, the date fixed in the contract, to be $289,575.80, and the amount of credit applicable thereto to be $152,274.40, it is respectfully submitted that the balance, namely, $137,301.40, is due and owing from the United States to the appellant, and that judgment should be entered for this amount with interest from October 31, 1918, until paid, and costs.

Respectfully submitted,

THE FERRIES COMPANY,
By Counsel.

GARNETT, TAYLOR & EDWARDS,
HUGH C. DAVIS & HUGH W. DAVIS,
Counsel.

IN THE

Supreme Court of the United States

No. 298.

THE FERRIES COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF OF APPELLANT

MISCONCEPTIONS IN GOVERNMENT'S BRIEF.

The attention of the Court is respectfully invited to the following misconceptions appearing in the Government's brief:

1. On page 4, the Bureau of Industrial Housing and Transportation is referred to as the "succeeding lessee" in the sense of that term as contained in the lease of March 31, 1909. From this the inference is drawn in the Government's brief that appraisal should have been made by a Board selected under the terms of the original lease applicable to an appraisal should there have been a "succeeding lessee." In fact, the Appraisal Board was selected in the manner provided by the terms of the lease of March 31, 1909, applicable to the termination of the lease without there being a "succeeding lessee."

It is respectfully submitted that the Bureau was not a "succeeding lessee" but under the terms of the contract of October 8, 1918, became entitled to the possession of the property in *substitution* for the plaintiff; the *right* to possession being fixed by the contract of October 8, 1918, which contract expressly provided that the lease "should be terminated as of the time that the operation

of said Ferries is taken over by the Bureau," and the *nature* of the possession being left by said contract for adjustment between the owners of the property and the Government, and being referred to in the contract of October 8, 1918, as a taking over by the United States Government of "the operation of the Norfolk County Ferries" (presumably for the account of the owners).

No conclusion is drawn by the Government Counsel from his criticism of the method of selection of the Appraisers, and it is doubted if any effect on the present proceeding would result therefrom, but, nevertheless, the misnomer of the Bureau as a "succeeding lessee" is now called to the attention of the Court.

(2) On page 6, the Government suggests that the claimant has undertaken to recover at law upon an *implied* contract on the part of the United States to pay "just compensation" for property of the claimant appropriated to public use. It is respectfully submitted that the averments of the petition do not justify such a construction, and such a claim is hereby expressly disclaimed by the plaintiff. The plaintiff takes no issue with the authorities cited on page 7 of the Government's brief or to the statements deduced therefrom by Government's counsel, and concurs with Government's counsel that if the plaintiff's claim had been based "upon an implied contract to pay the fair value of the property or upon a taking which was unauthorized or unwarranted in law," the petition should have been properly dismissed for want of jurisdiction. The plaintiff respectfully submits, however, that its claim is based upon an *express* contract with the Government, namely, the contract of October 8, 1918, which contract contains the express agreement of the Government to pay to the plaintiff the fair value of the property *as of the time of taking, namely, October 31, 1918.* (Findings of Fact V.)

(3) On page 11 of its brief, the Government suggests that the provisions of the contract of October 8, 1918, providing that the appraisal shall take place "as of the time that the Ferries shall be taken over by the Bureau" fix "the time of the inventory and appraise-

ment," but are silent "as to the method of the valuation which shall be applied."

It is respectfully submitted that these provisions do not fix the time of the inventory and appraisement, but do fix the time or period to be used in determining the basis of value.

Had the contract sought to fix the time of the appraisal the appropriate language to have been used in Paragraph Second (set forth in Government's brief) would have been "that the appraisal . . . . shall take place *at* the time that the ferries shall be taken over." On the other hand the contract provides "that the appraisal . . . . shall take place *as* of the time that the ferries shall be taken over."

(4) On page 12, the Government contends that there is nothing in the lease of 1909 "to indicate an intention that the lessee should be paid at the termination of the lease for an unearned increment arising out of appreciation in value of the owner's property." The plaintiff excepts to this statement and contends to the contrary, namely, that the original lease expressly provided that both appreciation and depreciation would be determined by an appraisal at the termination of the lease. Furthermore, in the instant case, the contract of October 8, 1918, was made during the prevalence of war conditions and war prices, in full contemplation of the standard of values then prevailing, and was made with reference to compensation in the then depreciated currency (for the Court will take judicial notice that the purchasing power of a dollar on October 8, 1918, was one-half of the purchasing power of a dollar in 1909). This contract of October 8, 1918, thereupon and under the existing conditions expressly recognized and fixed October 31, 1918, as the period to be used in ascertaining value.

The plaintiff contends that the owners were required under the lease of 1909, to buy back their property at its termination, and that the contract of October 8, 1918, recognized this fact, created a novation, and expressly

fixed in terms the date to be used in determining the basis of value.

(5) On page 5, the Government contends that in this proceeding the Court of Claims was without jurisdiction to give judgment to the claimant for $12,654.28, the amount of the appraisal made by a majority of the Board of Appraisers. Apparently Government's counsel bases this statement on his alleged premises that (a) the Ferries Company did not accept the appraisal of a majority of the Board, and (b) made no demand on the Government for the amount of such appraisal.

It is respectfully submitted that neither acceptance nor demand prior to the institution of this proceeding were conditions precedent to the right of the claimant to the lesser amount found by the majority of the Board to be owing, in the event that the appraisal were not set aside and the fair value determined by the Court of Claims in accordance with the contract of October 8, 1918.

WAIVERS.

The plaintiff makes no further contention that the appraisers were not "disinterested persons" as required by the terms of the lease, and no further contention that the failure of all five of the appraisers to join in an unanimous valuation would in itself vitiate the award.

On the other hand, the plaintiff contends that the appraisal was invalid by reason of appraisers' mistake in construing and applying the *contract* which submitted the matter to appraisal and defined the limits of the appraisal. *Low Estate Company* v. *Lederer Realty Co.*, 35 R. I. 352.

JURISDICTION OF THE COURT OF CLAIMS.

The plaintiff accepts the Government's interpretation of the existing decisions concerning the equity jurisdiction of the Court of Claims; namely, that the Court of Claims exercises a "limited equitable jurisdiction such as is ancillary and necessary to afford full relief in actions ex contractu."

In the instant case, the claimant's petition, and the findings of fact made by the Court of Claims, set forth the following fundamental elements of an action ex contractu, namely:

(a) An express contract by the Government to pay money to the claimant for property delivered to the Government by the claimant;

(b) An express contract for the ascertainment of the amount of this payment in a way specifically provided for in the contract; and

(c) The failure of the Government to pay.

The petition then proceeds to allege, and this allegation is supported by the findings of fact of the Court of Claims, that the method of determining the amount of money due the claimant from the Government, as defined in the contract, was not followed, was contrary to the rights of the claimant under the terms of the contract, and the petition thereupon invokes the equity jurisdiction of the Court of Claims as ancillary to its action ex contractu. Having invoked equity jurisdiction the plaintiff then proceeds to ask for complete relief and a money judgment against the United States for the fair value of its property.

The equity jurisdiction of the Court of Claims as applicable to this class of cases, simply requires that there must be a contract, express or implied, and the claimant must be entitled to a judgment for money. *United States* v. *Jones*, 131 U. S., 1.

Certainly the invocation of equity jurisdiction in the instant case is in accordance with the terms of Section 145 of the Judicial Code, the opinion of this court in *United States* v. *Jones*, supra, and clearly analogous to the decisions of this Court in *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168; and *Wm. Cramp and Sons* v. *United States*, 216 U. S. 494.

LIMITATION OF APPRAISERS' POWERS.

Appraisers, whether acting upon a matter of public or private concern, must stay within the power granted

them; *Low Estate Co.* v. *Lederer Realty Co.*, 35 R. I. 352; *Omaha* v. *Omaha Water Company*, 218 U. S., 180. It is only when they stay within such power that a majority finding is binding, even in a matter of public concern. It plainly appears in the instant case that the majority appraisers wholly departed from the standard of values in contemplation of the parties, and provided for by the contract. They were charged with no duty and invested with no power of construction. The values ascertained by them, were found by the Court of Claims to have been predicated upon their departure from the grant of power (Findings VIII.) We can nowhere find that any court has held an appraisement, whether in a matter of public or private concern, to be valid and binding where the power of the appraisers was exceeded.

The case of *Omaha* v. *Omaha Water Company*, supra, impliedly recognizes that where such powers are exceeded even in a case where ordinarily a majority valuation would govern, the finding should be set aside.

It is respectfully submitted that this Court has repeatedly recognized the principle that when property has increased in value since it was acquired, the owner is entitled to the benefit of such increase on appraisal as of the time when the property is appraised, and in this connection the Court's attention is invited to the following extract from opinion of the Circuit Court of Appeals of the Eighth Circuit, in *City of Minneapolis* v. *Rand, et als*, 285 Fed. 818, 827:

> "In valuations of public utilities, there has been some doubt expressed by courts and commissions having the duty in charge, as to what importance is to be given to prices as affected by the conditions resulting from the war, as may be seen in a review of many cases in a note to Petersburg Gas Co. v. City of Petersburg, 20 A. L. R. 542, 589; but the rule established by the decisions of the Supreme Court of the United States, which have been cited is that the fair value at the time in question must be taken, and this rule has been applied, although the war and

its results have advanced prices far beyond the ordinary prices existing before the war. Potomac Electric Power Co. v. Public Utilities Com'n., 276 Fed. 327, 329, 51 App. D. C. 77; Consolidated Gas Co. of New York v. Newton (D. C.) 267 Fed. 231, 232, 234, 236; St. Joseph Ry., Light, H. & P. Co. v. Public Service Com'n. (D. C.) 268 Fed. 267, 269; Joplin and P. Ry. Co. v. Public Service Commission (D. C.) 267 Fed. 584, 587; City of Winona v. Wisconsin-Minnesota Light & Power Co. (D. C.) 276 Fed. 996, 1002; New York & Queens Gas Co. v. Newton (D. C.) 269 Fed. 277, 289; Elizabethtown Gas L. Co. v. Board of Public Utility Commissioners, 95 N. J. Law, 18, 19, 111 Atl. 729; Petersburg Gas Co. v. City of Petersburg (Va.) 110 S. E. 533, 20 A. L. R. 542.

"The gas company is entitled to the fair value of its property, even though that value has been increased as a result of the war, just as the laborer, the merchant, the manufacturer, the owner of land, and the lender of money may require the prevailing prices for what they furnish."

CONCLUSION.

It is respectfully submitted, therefore, that the findings of the Court of Claims called for the application of the equity jurisdiction, with which that Court is invested in aid of the claimant and a judgment in its favor for the net sum of $137,301.40 should have been entered; being the value of the property purchased by the United States under the contract *as of October 31, 1918*, the date fixed by the contract, as determined by the Court of Claims (Findings VIII.), over and above the agreed credits.

Respectfully submitted,

THE FERRIES COMPANY,
By Counsel.

GARNETT, TAYLOR & EDWARDS,
HUGH C. DAVIS & HUGH W. DAVIS,
Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE FERRIES COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA } No. 298

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

The Ferries Company has appealed to this Court from a judgment of the Court of Claims which dismissed its petition for want of jurisdiction.

On March 31, 1909, the City of Portsmouth and the County of Norfolk, Virginia, owners of the properties known as the Norfolk County Ferries, leased the same for a period of ten years beginning April 1, 1909, to R. E. Jordan, who assigned his rights as lessee to The Ferries Company, a Virginia corporation. (R. 24–25.) The lease provided that the properties should be taken over by the lessee at the valuation fixed by a board of appraisers appointed

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under the then existing lease, and that a similar appraisal should be made at the conclusion of the term. If the value at the end exceeded that at the beginning, the owners were obligated to pay the difference to the lessee; and if it were less, the difference was to be paid by the lessee to the owners. (R. 24–25.)

This lease was terminated prior to the expiration of its term, and the operation of the ferries was taken over on November 1, 1918, by the Bureau of Industrial Housing and Transportation of the Department of Labor of the United States, under a tripartite agreement, to which the owners, the City of Portsmouth and County of Norfolk, were of the first part, the Ferries Company, lessees, of the second part, and the said Bureau, of the third part. (R. 25). That contract, which was dated October 8, 1918, contained among others, the following provisions (Finding No. IV, R. 25):

> Now, therefore, in consideration of the mutual promises and covenants in this agreement contained, it is agreed by and between the parties hereto, as follows:
>
> First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk, and now held by the Ferries Company, dated March 31, 1909, shall terminate as of the time that the Bureau shall take over the operation of said ferries, in the same manner and to the same effect as if such time

had been originally fixed in said lease as the time for the termination thereof.

Second. That the appraisal of the ferries properties so provided for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided, and *said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau,* as aforesaid.

Third. That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, *as a result of the said appraisal mentioned above, then such amount shall be paid* to the Ferries Company by the Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and *if any moneys shall be due* the City of Portsmouth and the County of Norfolk by the Ferries Company *as a result of said appraisal, then the Ferries Company shall pay such amount* to the Bureau instead of paying the same to the City of Portsmouth and the County of Norfolk, and the Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them of even date herewith. (Italics ours.)

The properties having been taken over by the Bureau, a board of appraisers was selected. W. W. Colonna and J. M. Emery were chosen by The Ferries Company, J. Wiley Halstead by the City of

Portsmouth, Charles F. Harper by the County of Norfolk, and Cornelius Thomas by the four first chosen. (Finding No. VI, R. 26.) None of the appraisers were selected by the Bureau, the succeeding lessee, although the contract of October 8, 1918, provided that "said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau" (Finding No. IV, R. 25–26), and the original lease of March 31, 1909, had provided that one should be chosen "by the succeeding lessee, should there be a succeeding lessee," and "should there be no succeeding lessee then two shall be chosen by the lessee" (Finding No. III, R. 24–25).

After making extensive inquiries and hearing much testimony as to the value of the properties to be appraised, three members of the Board, Harper, Halstead, and Thomas, concurred in a report which fixed the value as of October 31, 1918, at $164,928.68, which valuation, with minor exceptions, was based upon pre-war conditions and values. (Finding No. VIII, R. 27.) The remaining two members of the Board, Colonna and Emery, declined to concur in the report because, as they said, it was not based upon values as they existed on October 31, 1918. (Finding No. VII, R. 26.) The value of the properties upon a "war-basis," as found by the Court of Claims, was $289,575.80 (Finding No. VIII, R. 27), and the value on April 1, 1909, when the properties were acquired by the Ferries Company, was $152,274.40 (Finding No. VIII, R. 27).

If the Ferries Company had accepted the appraisal made by a majority of the Board, had made demand upon the United States for payment of the difference between $164,928.68, and $152,274.40, or $12,654.28, and such demand had been refused; and if it had then brought its action in the Court of Claims for the recovery of that amount, a question of liability would have been presented which does not arise upon the record now before this Court. No such claim has been made.

The Ferries Company presented its petition to the Court of Claims, in which, after setting out tabulations of differing values, it averred that for numerous reasons the appraisal which had been made was not in accord with the contract, was null and void, was not binding upon it, and constituted a fraud upon its rights (Paragraphs 9–17, R. 9–11). It further averred that its property had been taken by the United States, and that it was entitled to receive from the United States "just compensation," which was $343,702.16. (Paragraph 18, R. 11.) The petition concluded with the following prayer:

> Whereof, your petitioner further states that the action of said appraisers as contained in said "Majority Report" be set aside and declared null and void for the reason hereinabove set forth, and that this honorable Court inquire into and fix the value of the property of your petitioner taken by the United States of America, as aforesaid, and render judgment against the United States of America for the value thereof, which your petitioner claims

is the said sum of Three Hundred and Forty-three Thousand Seven Hundred and Two and Sixteen Hundredths ($343,702.16) Dollars, with interest thereon from the thirty-first day of October, 1918, until paid.

The principal question here involved is whether the Court of Claims had jurisdiction of this cause of action.

ARGUMENT

I

The Court of Claims had no jurisdiction of the cause of action set forth in the claimant's petition

The precise nature of the cause of action upon which the Claimant sought to recover in the Court of Claims does not clearly appear from the petition. Its averments would seem to support equally well two distinct theories: (1) That the Claimant has a right to recover at law upon an implied contract on the part of the United States to pay "just compensation" or "fair value" for property of the Claimant taken by it and appropriated to public use (See paragraph 18 of the petition, R. 11); and (2) That the Claimant has a right in equity to have the appraisal which was made by a majority of the board of appraisers set aside, and thereupon to have the Court of Claims enter upon and make a new appraisal and thereafter render judgment in favor of the Claimant for the amount found to be due after such appraisal. (See paragraph 20 of the petition, R. 11.)

The Court of Claims was without jurisdiction to entertain the petition upon either of these theories.

1. *As to the action at law.*—We take these propositions to be well settled by the decisions of this Court: That the Court of Claims has jurisdiction under Section 145 of the Judicial Code to hear and determine causes of action based upon contracts express or implied between a claimant and the United States; that a contract will be implied when officers of the United States lawfully empowered so to do, take and appropriate to public use property which they admit belongs to the claimant (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645 and 124 U. S. 581; *United States* v. *Lynah*, 188 U. S. 445); that no such contract will be implied, however, and the Court of Claims is without jurisdiction, in cases where the United States enters into possession of property claiming title, or the right of possession under a contract (*Langford* v. *United States*, 101 U S. 341; *Hill* v. *United States*, 149 U. S. 593; *Tempel* v. *United States*, 248 U. S. 121; *Klebe* v. *United States*, 263 U. S. 188); and that if there be a taking of property under a claim of right and no such right in fact exists, the taking is tortious and no action to recover therefor can be maintained in the Court of Claims (*Langford* v. *United States*, 101 U. S. 341).

In the instant case it clearly appears from the petition that the United States acquired the Norfolk County Ferries under the terms of an express contract. Accordingly there was no "taking" and no implied

promise to pay "just compensation" or "fair value," such as would give jurisdiction to the Court of Claims. (*Klebe* v. *United States*, 263 U. S. 188.) If the claim be treated as one based upon an implied contract to pay the fair value of the property, or upon a taking which was unauthorized or unwarranted in law, it was properly dismissed for want of jurisdiction.

2. *As to the action in equity.*—The Court of Claims is not a court of equity and does not have general equitable jurisdiction. (*United States* v. *Jones*, 131 U. S. 1.) It does exercise a very limited equitable jurisdiction, such as is ancillary and necessary to afford full relief in actions *ex contractu*. It may re-form contracts which because of fraud or mutual mistake of fact do not represent the agreement of the parties. (*United States* v. *Milliken Imprinting Co.*, 202 U. S. 168; *Wm. Cramp & Sons* v. *United States*, 216 U. S. 494.) But we know of no case in which its equitable jurisdiction has been held to extend farther.

In the instant case the claimant appeals to the Court of Claims as a court of equity to examine into the making of the appraisal of the ferries property and to find and declare that that appraisal was irregular, not in accord with the terms of the contract, not binding on the claimant, fraudulent, null and void; then to set itself up as a substitute board of appraisers, to examine into the value of the property and ascertain what its true value was on October 31, 1918; and after this has been done, then

to enter judgment in favor of the Claimant for the amount thus found to be due.

Such relief was afforded in a proper case by a court of general equitable jurisdiction in the case of *Low Estate Co.* v. *Lederer Realty Co.*, 35 R. I. 352. Conceding, for the purpose of the argument only, that this is a proper case for such relief, we respectfully submit that the Claimant must seek it in a court of general equitable jurisdiction. The Court of Claims is not such a court.

II

The appraisement made by a majority of the appraisers was valid and binding upon the claimant

If the conclusion of the Court of Claims that it was without jurisdiction to hear and determine the claimant's cause be erroneous, the question then arises whether the report made by a majority of the appraisers should be set aside. We think it is clear that this appraisement is valid and binding upon the claimant.

The parties to the lease submitted the matter of appraisement and valuation to a board of appraisers, from whose findings no right of appeal or review was provided for. In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise honest judgment, the finding of the board is conclusive upon the parties.

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549.

United States v. *Mason & Hanger Co.*, 260 U. S. 323.

Was there any such fraud, gross mistake, or bad faith in the instant case? Not only are these elements absent, but it seems clear that this appraisement as reported by a majority of the board was properly made, in accordance with the true purpose and intent of the contract, and was valid and binding upon the parties. The Claimant's first contention is that the valuation was improperly made.

The original contract contained the following pertinent provisions (Finding No. III, R. 24):

> Third. That all property turned over to the lessee is to be kept by him in good running order and condition.
>
> * * * * *
>
> Fourth. * * * and at the termination of the said lease, all the property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding lessee, should there be one, be inventoried and valued by a board of five disinterested persons. * * *

And the contract of October 8, 1918, contained the following pertinent provisions (Finding No. IV, R. 25):

> Second. That the appraisal of the ferries properties so provided for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided, and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau, as aforesaid.

It will be noted that while these provisions fix the *time* of the inventory and appraisement, they are silent as to the *method of valuation* which shall be applied. The contracting parties left this to be determined by the appraisers, guided by the spirit and intent of the lease. (Cf. *Low Estate Co.* v. *Lederer Realty Corp.*, 35 R. I. 352, 358—360.) The petition and brief of the Appellant fail to distinguish between the *time* of the inventory and appraisement and the *method of valuation*. The valuation of the ferries as fixed by the majority of the appraisers is a valuation "as of October 31, 1918, when they were turned over by the plaintiff company to the United States." (See second paragraph of Finding No. VIII, R. 27.) The Appellant's real complaint is that a certain method of valuation was not adopted. Let us look at the lease.

The owners turned over to the lessee the ferries property with a specific covenant that the latter should keep it in good order and condition. Other

provisions insured the making of necessary improvements (Paragraph 10, R. 17) and reserved to the owners substantial control over all major additions to the plant. (Paragraph 14, R. 17.) And when the property was returned at the termination of the lease it was to be inventoried and appraised for the obvious purpose of preventing undue gain or loss to either party by reason of the making or failure to make necessary repairs, improvements, or additions to the property. There is nothing in the agreement to indicate an intention that the lessees should be paid at the termination of the lease for an unearned increment arising out of appreciation in value of the owners' property. Nor is there any principle of justice or equity which requires that they should reap a benefit, amounting in this case to about 100%, out of a fortuitous increase in value of assets which did not belong to them. The lease did not contemplate that the owners should be required to buy back their property at the termination of the lease.

In making an appraisement for the purposes of this lease, therefore, the majority of the appraisers were undoubtedly carrying out the spirit and intent of the lease when they rejected the "reproduction cost new less depreciation" basis for valuation. The findings of the Court of Claims do not show precisely what method was adopted. It is said that the valuation "was based upon pre-war conditions and values" (Finding No. VIII, R. 27). We think it a fair inference, however, that the majority of the appraisers adopted an historical method of valuation. This

method gave to the lessee the benefit of all actual additions and improvements made by it, and withheld only the unearned increment to which the lessee had no right or title under the lease. Such an appraisement was not out of keeping with the purpose and intent of the contract, and ought not to be disturbed.

Monidah Trust v. *Arctic Const. Co.*, 264 Fed. 303, 306.

The Appellant further contends that it is not bound by the valuation made because it was not joined in by all five of the appraisers. But the rule as laid down by this Court is opposed to this contention. In *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 192, Mr. Justice Lurton said:

> When a matter of purely private concern is submitted to the determination of either arbitrators or appraisers the rule seems to be that there must be unanimity of conclusion by such board, unless otherwise indicated by the terms of the submission. [Citing cases.] The rule is, however, otherwise when the submission is one which concerns the public. In such submissions, whether it be the arbitration of a difference or the ascertainment of a value, a majority may act, unless otherwise indicated by the agreement for submission.

See also *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 547.

It can not be doubted that the matter here submitted to the appraisers was one of public concern.

The owners of the property to be appraised were two of the municipal divisions of the State of Virginia, and the lease under which the appraisement was made was specifically provided for by an Act of the General Assembly of Virginia (See Exhibit "A" to Petition, R. 12). Aside from any public interest with which the appraisal may have been clothed by reason of the fact that the United States had become the succeeding lessee; the public ownership of the property by the City of Portsmouth and the County of Norfolk brought it clearly within that class of cases which "concern the public."

Finally it is urged that the appraisement must be set aside because some of the members of the board were not "disinterested persons," as required by the terms of the lease. Their alleged interest was due to the fact that they were taxpayers in the City of Portsmouth or the County of Norfolk. The answer to this contention is three-fold: (1) The alleged interest is too remote to disqualify the appraisers; (2) The record does not show that the claimant made any objection to the qualifications of the appraisers until after the valuation had been completed; and (3) The record shows that the claimant itself selected W. W. Colonna, a taxpayer, and that the two appointees of the claimant joined in selecting Cornelius Thomas, also a taxpayer, as the fifth member of the board. In view of these circumstances a court of equity could not sustain such a contention. (See *Morse on Arbitration and Award*, 100 ff.)

We respectfully submit that neither the method of valuation adopted, nor the failure of a minority of the board to concur, nor the alleged interest of the appraisers, constitute a fraud upon the claimant; nor was there such gross mistake as would necessarily imply bad faith or a failure to exercise honest judgment. The appraisement made by the majority is, therefore, binding upon the claimant.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
GEO. ROSS HULL,
Special Assistant to the Attorney General.

MAY, 1924.

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THE FERRIES COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 46. Argued October 8, 1924.—Decided November 17, 1924.

A ten year lease of ferry property provided that, at its termination, the property leased, including any additions and betterments that might be made by the lessee, should be valued by appraisers, and that if such valuation were less than the value of the property as similarly appraised when the lease was made, the lessee should pay the difference, but, if more, the lessors should pay it. During

the war, when the term had nearly run, the United States, by agreement with the parties, took over the operation of the ferries, under stipulations that the lease should then terminate, that appraisal should be made as of that time, as if the lease had then regularly terminated, and that any money thus found due the lessee or lessors, as the case might be, should be paid to the one so entitled, and charged against the other, by the United States. *Held*, that an award for the lessee, based largely on conditions and values existing before the advent of war prices, correctly interpreted the lease and agreement, and that the lessee was not entitled to set the award aside, or to any relief in a court of equity. P. 263.

57 Ct. Clms. 616, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition.

Mr. W. R. L. Taylor, with whom *Mr. Hugh C. Davis* and *Mr. Hugh W. Davis* were on the briefs, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. George Ross Hull*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The city of Portsmouth and the county of Norfolk, Virginia, made a lease of the Norfolk Ferries operating between Portsmouth, Norfolk and Berkeley for a term of ten years, beginning April 1, 1909, to plaintiff's assignor. The properties consisted of boats, their equipment, wharves and other property used for the operation of the ferries. All the property turned over to the lessee, except land, was taken by the lessee upon the inventory and valuation thereof made by a board of appraisers selected under a prior lease then about to expire. It was agreed that at the termination of the lease the property so accepted, including any boats which might be purchased or built by the lessee for the operation of the ferries, and

any improvements made by the lessee should be inventoried and valued by a board of five disinterested persons. And it was provided that if such valuation should be less than the value of the property turned over to the lessee by the lessors, the lessee should pay the difference, but if more, the lessors should pay the difference.

Under date of October 8, 1918, the lessors, the plaintiff and the United States (acting by the Bureau of Industrial Housing and Transportation of the Department of Labor) made an agreement, by which the United States took over the operation of the ferries. It was provided that the lease should terminate at the time of the turning over of the properties to the Bureau and that "the appraisal . . . provided for in said lease shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided, and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau . . ." It was agreed that if, as a result of the appraisal, plaintiff was found to be entitled to any money from the lessors, it should be paid by the Bureau and charged to lessors, and that if the lessors were found to be entitled to any money from the plaintiff it should be paid to the Bureau and credited to lessors. The ferries were taken over and their operation was commenced by the Bureau, November 1, 1918.

The appraised value of the properties as of March 31, 1909, was $152,274.40. The appraised value as of October 31, 1918, determined under the agreement, was $164,928.68. This valuation, except as to certain items amounting to $33,688.65, was based on prewar conditions and values. The Court of Claims found that the value of the properties as of the last mentioned date, based on war prices and values then prevailing, was $289,575.80.

It is clear that, under the agreement of October 8, 1918, the United States was bound,—and it was stated by its counsel that it has been willing,—to pay plaintiff the difference between the appraised value of the properties turned over to lessee, March 31, 1909, and the appraised value of those turned over by plaintiff, October 31, 1918. But, by its petition in this action, plaintiff asserted that it was entitled to have that value determined on the basis of prices prevailing October 31, 1918, alleged that this was $343,702.16, and prayed that the appraisers' valuation be set aside, and that the court determine the value and give plaintiff judgment against the United States for the amount thereof.

The Court of Claims found the facts as indicated above. As a conclusion of law, it decided that the petition should be dismissed for want of jurisdiction. It entered judgment that the plaintiff was not entitled to recover, and that the petition be dismissed.

Plaintiff was not entitled to recover the value of the properties it turned over to the United States. There was no expropriation. The transfer was made under the agreement.

The valuation under the agreement was not required to be made on the basis of war conditions and prices then prevailing. The appraisal was to take place as of the time, and it was to be made as if, the lease had terminated. The purpose of the two appraisals provided for in the lease,—one at the beginning and the other at the end of the term—was to find the changes which had occurred in the value of the properties due to changes in condition of the things received by the lessee at the beginning and returned to lessors at the end of the term, and also the changes due to retirements, additions and betterments during the term. It is apparent from the provisions of the lease,—and in his argument before the court plaintiff's

counsel conceded,—that it was not intended that any gain or loss to lessors or lessee should result from differences between unit prices existing at the beginning of the term and those prevailing at its expiration. Plainly, it was not the intention of the agreement to give plaintiff the benefit of high prices then prevailing. It was not the owner, and its lease was about to expire. On the basis of the appraisals provided for in the lease, it would have been entitled to receive no more than $12,654.28. The parties knew that prices in October, 1918, were much higher than those on which the appraisal of March 31, 1909, was made, and that, if they were to be taken as the basis of appraisal under the agreement, plaintiff, by mere rise of prices applicable to property it did not own, would profit enormously. It was not in position to exact any such amount. The provisions of the agreement show that the parties intended to make no change in the basis of valuation. The appraisal was to be made as if the lease had terminated and on the same basis of prices and conditions. This so plainly appears from the language of the agreement that elucidation is not necessary.

Plaintiff did not seek to recover on the basis of the appraisal made under the agreement with the United States, but on the contrary, it assailed that valuation as null and void. The only ground of attack relied on in this Court was that the appraisers misconstrued and misapplied the agreement. But, as above indicated, we hold there was no misinterpretation. The facts found are not sufficient to entitle the plaintiff to have the award set aside, or to any relief in a court of equity. Therefore, the jurisdiction of the Court of Claims to grant equitable relief need not be considered.

Judgment affirmed.